

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1195

MAY 3 1946

CHARLES ELMORE GROPLAY

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY
COMPANY OF NEW YORK,

Petitioners,

—vs.—

THE UNITED STATES OF AMERICA to the use of
BALTIMORE BRICK COMPANY.

No. 1196

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY
COMPANY OF NEW YORK,

Petitioners,

—vs.—

JACOB FRIEDMAN, trading as J. FRIEDMAN COMPANY.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF**

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Aswel-Law Brief Press, Inc.

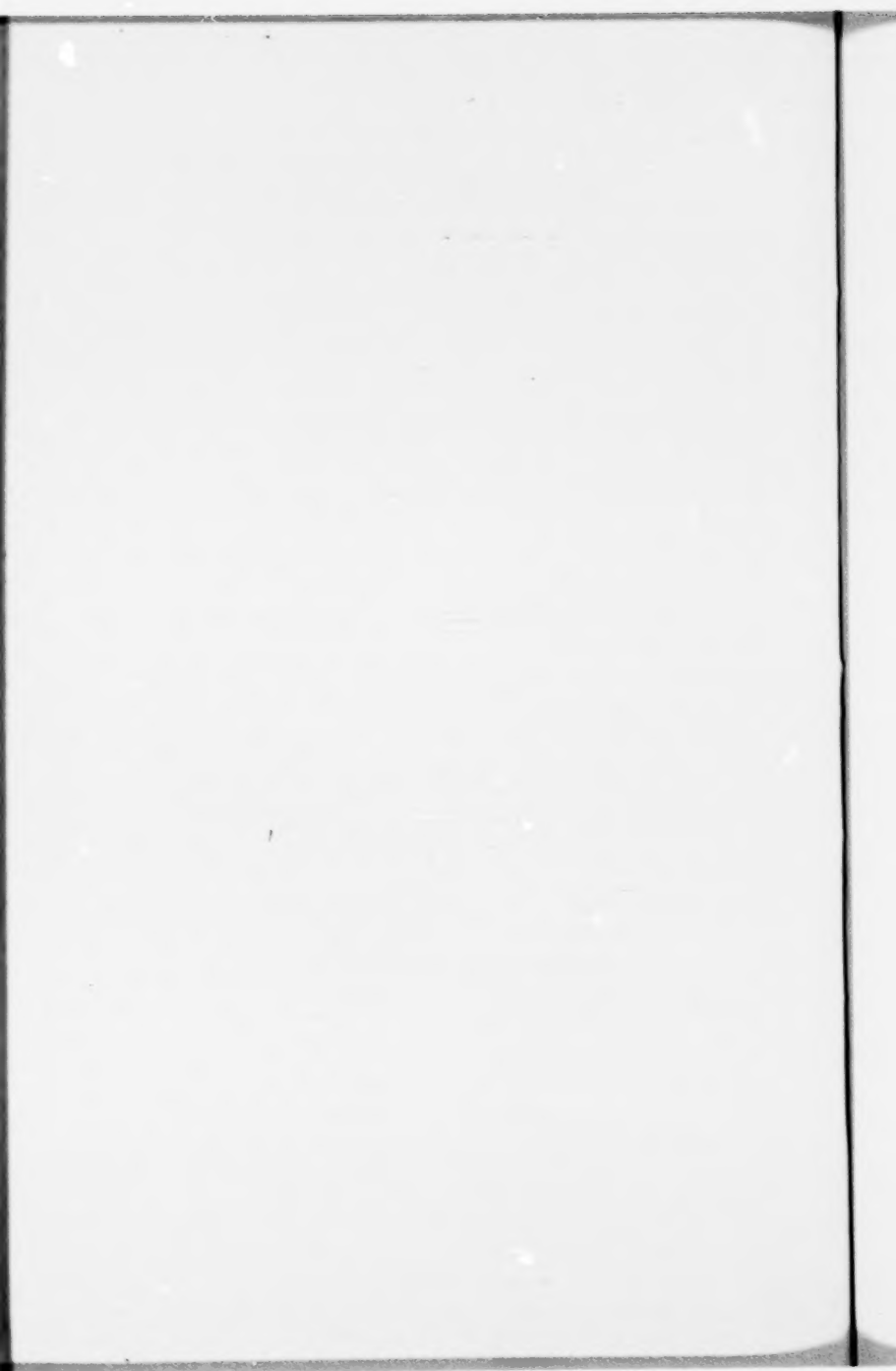


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PETITION

The petition of John A. Johnson & Sons Inc., and American Surety Company of New York, respectfully shows to this Court:

This is a petition for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

On February 6, 1946, orders were made by said Circuit Court of Appeals affirming judgments of the United States District Court for the District of Maryland entered on April

19, 1945, in favor of the United States of America to the use of Baltimore Brick Company against petitioners and Jacob Friedman in the amount of \$5,655.20, with interest and costs of suit, and in favor of Jacob Friedman against petitioners in the amount of \$8,555.40, with interest and costs of suit.

Jurisdiction.

The Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Act of February 13, 1925.

Statement of the Matters Involved.

Petitioner, John A. Johnson & Sons Inc., (herein referred to as "Johnson") was the general contractor under a contract with the United States of America for the construction of certain buildings at Jarboesville, Maryland. Petitioner American Surety Company of New York (herein referred to as "Surety") was the surety under the Miller Act* bond filed by Johnson for the performance of the contract and for the payment of materials used in the prosecution of the work.

Respondent Jacob Friedman (herein referred to as "Friedman"), was a subcontractor of Johnson for the masonry and concrete work. Respondent, Baltimore Brick Company (herein referred to as "Brick Company") was a materialman of Friedman.

The Brick Company brought an action under the Miller Act in the United States District Court for the District of Maryland against the petitioners and Friedman, for a balance alleged to be due for brick ordered by Friedman in the construction of the buildings. The petitioner and Friedman

* Act of August 24, 1935 c. 642, 49 Stat. 793, 40 U. S. C. Section 270a, et seq.

defended said action on the ground that the brick had been condemned and rejected by the Government for the reason that the brick failed to comply with American Society for Testing Materials (herein referred to as "A. S. T. M.") specifications C62-41T, Grade MW, required by the Government contract, in that the compressive strength of the brick was below the allowable individual minimum of 2200 pounds per square inch (R. 58). At the same time, Friedman instituted an action against petitioners for additional expense in tearing down and replacing the brick work so condemned by the Government and in furnishing higher priced brick. Petitioners defended Friedman's action on the ground that under the provisions of the subcontract, Friedman was bound to the same extent as Johnson by the Government rejecting and condemning the brick.

The actions were tried together in the District Court, the evidence in the Brick Company action being included by stipulation in the Friedman action.

The District Court held in the Brick Company case that the Brick Company was not bound by the Government contract and related specifications which covered the Government project, despite the knowledge brought home to the Brick Company with respect to the use of the brick and no matter what Friedman's obligation with respect to Johnson might be, or with respect to Johnson's obligation to the Government, that it was not material whether the brick met the requirements of the Government contract or not, and that Friedman had failed to sustain the burden of proof of breach of warranty by the Brick Company (R. 4-7).

The Circuit Court of Appeals referred to the Government test showing that the brick did not conform to the specifications, but rejected such test as determinative (Rec. 6, 7) and sustained the District Court on the evidence that Friedman had failed to establish a breach of warranty.

In the Friedman action, the District Court reaffirmed the

validity of the Brick Company claim and held that the Government test was not in conformance with A. S. T. M. specifications, in that the test was not made by a person appointed by the purchaser at a place designated when the purchase order was placed, and that, notwithstanding the agreement of Friedman to assume all the obligations of Johnson with respect to the work required by the subcontract and to be bound by all Government rulings and requirements to the same extent as Johnson, and to make the required tests of materials Friedman was entitled to recover from petitioners, because the Government breached its contract with respect to Johnson, and because Johnson could not avoid liability to Friedman because of the Government's breach (R. 182).

The Circuit Court of Appeals in the Friedman action, referred to its holding in the Brick Company case that the brick did conform to the specifications and that the condemnation and rejection of the brick by the Government, and the instruction of Johnson to Friedman based thereon, were wrongful, and further held that while, generally, Friedman was bound by the rulings and requirements of the Government, Friedman was not bound by the act of the Government in rejecting the brick, under the circumstances of this case, because the Government failed to comply with the specifications as to the time and place for testing the brick (R. 276).

Neither the District Court, nor the Circuit Court of Appeals gave any effect to the provisions of the Miller Act whereby the bond furnished by Johnson thereunder was declared to be for the benefit of persons supplying material used in Government work, and not for material condemned and rejected, nor to the provisions in the standard form of Government building construction contract, whereby the Government is given the right to reject defective materials during the course of construction, and whereby the rulings of the Contracting Officer with respect to fitness of material

were made final, and whereby the said materials were guaranteed for a year after final acceptance and whereby the subcontractor was bound by these provisions.

Both the District Court and the Circuit Court of Appeals, interpreting the A. S. T. M. specifications incorporated in the standard form of Government specifications with respect to the sampling and testing of brick, erroneously held that the Government was a purchaser of such brick so as to be required to sample and test the same before installation.

In this connection, the District Court and the Circuit Court of Appeals erroneously admitted and considered evidence of tests made by third persons and the testimony of a third person as to his opinion of whether the materials conformed to specifications, and accepted such evidence and opinion as controlling over the decision of the Government representative that the brick did not conform to specifications.

Questions Presented.

1. May a materialman recover under a Miller Act bond for the value of brick condemned by the Government and not used in the prosecution of Government work?

2. Under the standard form of Government construction contract, is the Government a purchaser of brick to be used in the erection of buildings, within the meaning of A. S. T. M. specifications, so as to require the Government to sample and test brick at the time the purchase order therefor is given by a subcontractor?

3. Does the Government by its failure to sample and test materials prior to installation, waive or lose its right, under the standard form of Government construction contract, to condemn defective material during the course of construction?

4. Under the standard form of Government construction contract, whereby the Contracting Officer shall decide all questions as to quality, acceptability and fitness of materials, and whereby all disputes concerning questions of fact shall be decided by the Contracting Officer, whose decisions thereon are made final,

- (a) May the Courts review the ruling of the Contracting Officer with respect to the fitness of materials?
- (b) Is evidence of a test made by third persons or the opinion of a third person admissible on the question as to whether materials conform to specifications, so as to overcome the contrary ruling of the Contracting Officer?

5. Where a subcontractor on Government work agrees to be bound by the rulings of the Government to the same extent as the general contractor and assumes all the obligations under the general contract with respect to such work, may the subcontractor recover from the general contractor for materials rejected and condemned by the Government and for work performed in removing such defective materials and replacing the same?

6. Is the provision in the standard form of Government construction contract, whereby a contractor guarantees his materials for a year after final acceptance, which provision is assumed by a subcontractor, waived by the Government by reason of the fact that it failed to sample and test materials before installation, although such materials were condemned as defective during construction?

7. Where the subcontractor agrees that the general contractor shall not be liable for additional cost of materials or extra work unless the general contractor receives payment

therefor from the Government, and the general contractor has not received such payment, may the subcontractor recover from the general contractor by reason of the fact that the Government improperly condemned material on the ground that it was defective?

Reasons for Allowance of Writ.

1. The Circuit Court of Appeals has erroneously construed the provisions of the Miller Act so as to make them applicable to a materialman whose material was rejected and not used in the prosecution of Government work.

2. The judgments of the Circuit Court of Appeals are contrary to the applicable decisions of this Court, and in conflict with the weight of authority, with respect to the finality of rulings by the Contracting Officer under the standard form of Government building construction contract with respect to quality, fitness and acceptability of materials.

3. The judgment of the Circuit Court of Appeals in the Friedman action is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *U. S. et al v. Madsen Construction Company*, 139 Fed. (2d) 613; and in conflict with the weight of authority, with respect to the binding effect of the rulings of a Contracting Officer under a Government construction contract upon a subcontractor who agrees to be bound by such rulings.

4. The Circuit Court of Appeals has erroneously construed, or failed to construe, provisions of the standard form of Government construction contract with respect to the Government right to reject materials during the course of construction and with respect to the contractor's guaranty of materials in a way in conflict with applicable decisions of this Court, and in a way untenable and in conflict with the weight of authority.

5. The Circuit Court of Appeals has erroneously construed A. S. T. M. specifications which are standard Federal specifications for brick used on Government work, so as to hold the Government to be a purchaser of brick under the standard form of Government contract for the construction of buildings, in a way untenable and in conflict with the weight of authority.

6. The Circuit Court of Appeals has failed to give effect to the provision in the standard form of Government construction contract whereby the contractor is required to guaranty his work and materials for a year after final acceptance and replace materials found to be defective.

7. The Circuit Court of Appeals has failed to give effect to the usual provision contained in subcontracts for building construction, whereby the general contractor is not liable to the subcontractor for additional work unless he receives payment therefor from the Government.

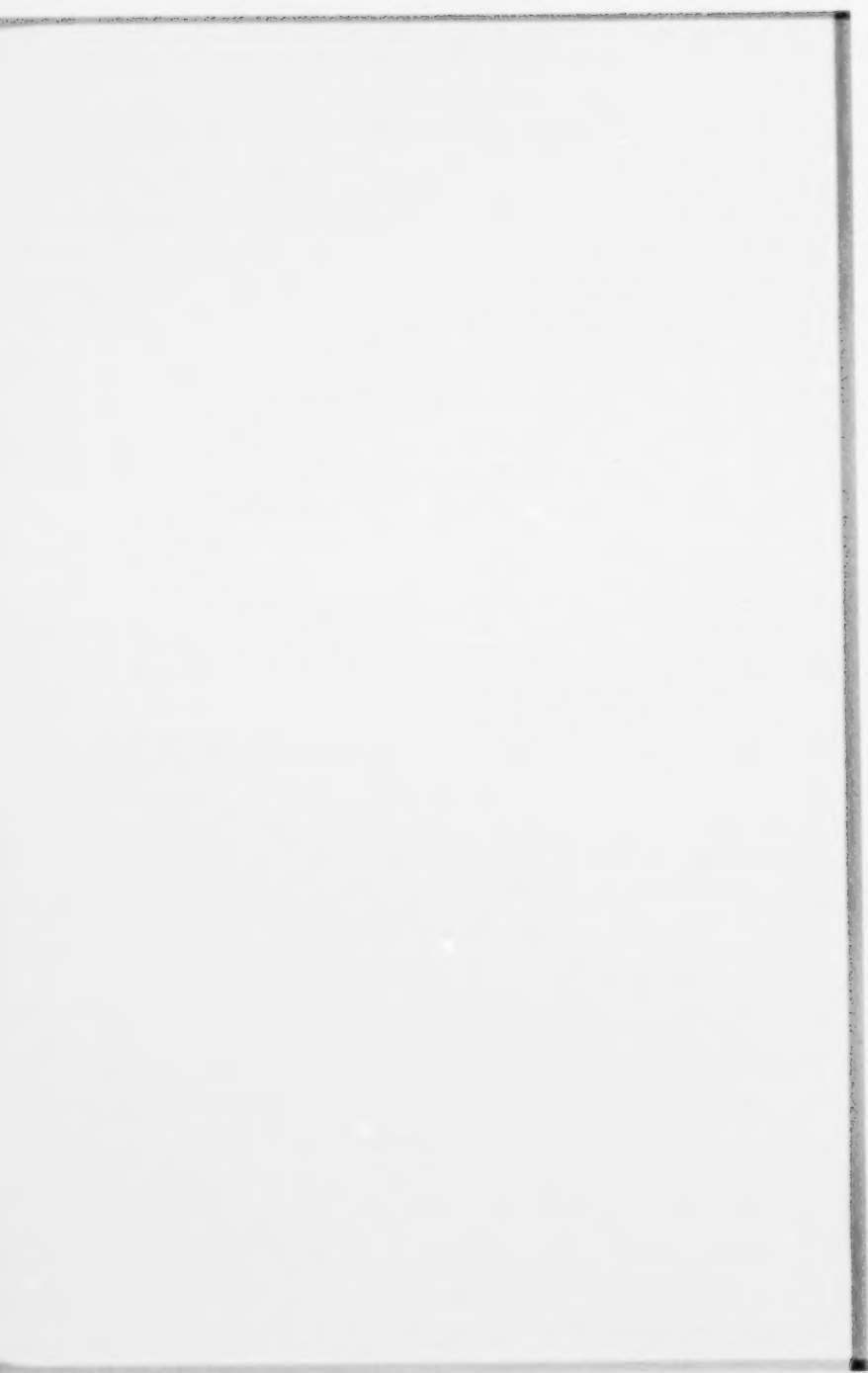
Petitioners therefore pray that writs of certiorari may be allowed to review the judgments of said Circuit Court of Appeals and that writs may be issued to said Court directing that all the proceedings may be forwarded to this Court for review.

Dated, New York, May 1st, 1946.

Respectfully submitted,

JOHN A. JOHNSON & SONS INC.,
AMERICAN SURETY COMPANY OF NEW YORK

BY: EMANUEL HARRIS
Counsel for Petitioners.





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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

I.

The Brick Company should not have been permitted to recover under the Miller Act bond for materials condemned and rejected by the Government.

The Miller Act* (Section 270a) provides:

“(a) Before any contract, exceeding \$2,000 in amount, for the construction * * * of any public build-

* Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U. S. C. Section 270a, et seq.

ing or work of the U. S. is awarded to any person, such person shall furnish to the U. S. the following bonds
* * *

The bond involved in these actions is described in the Miller Act as follows:

“(2) A payment bond * * * for the protection of all persons supplying labor and material in the prosecution of such work provided for in said contract for the use of each such person.”

The brick furnished by the Brick Company was not used or provided in the prosecution of the work, since they were condemned, and they were not used by “such person”, i.e. Johnson, for the same reason.

The right of action upon a Miller Act bond is stated in the statute as follows (Section 270b):

“(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act * * * shall have the right to sue on such payment bond for the amount, or the balance thereof unpaid at the time of institution of such suit * * *.”

Since the brick furnished by the Brick Company was condemned as defective, they were neither used in the prosecution of the work, nor were they within the work provided for in the contract, nor was the Brick Company a person who furnished material in the prosecution of the work. The Brick Company therefore had no right of action against petitioners under the Miller Act on the bond.

The theory upon which the Circuit Court of Appeals sustained the judgment was upon a breach of contract by the

Government in rejecting the brick. The Court said (R. 271) :

"But as respects the present claim, the burden of obtaining the analysis rested upon the purchaser. He should not have rested content without it. He waited for the Government to act, and *the Government in its turn was negligent.*"

And again (R. 273) :

"We approve this holding, which is equivalent to a finding that the Baltimore Brick Company brick measured up to the specifications, that Friedman in this respect complied with his contract with Johnson, and that therefore *the condemnation and rejection by the Project Engineer and the instruction of Johnson to Friedman based thereon was wrongful* and in violation of Friedman's rights."

There is no question of fact in the case that the brick was condemned by the Government after a test showing that the brick did not have the required minimum strength, that the brick was torn down and that it was replaced by better brick which did conform to specification.

The recovery allowed to the Brick Company was therefore premised upon breach of contract *and not upon the balance due* for brick accepted and used in the prosecution of the work. The Miller Act grants no right of action against the general contractor or its surety based on damage for breach of contract.

Moreover, under the circumstances of the case, the Brick Company should not be afforded the protection of the Miller Act, since it certified that the bricks furnished by it did conform to the A. S. T. M. specifications required by the Government (R. 18-19). Having misled the subcontractor, the

general contractor and the Government by its wrongful certification, the Brick Company should not have been granted the benefits of the Miller Act, which was intended to protect suppliers whose materials are accepted and used, not those whose materials are not only condemned but who misled the Government and the contractors with certifications found by the Government to be false.

In *MacEvoy Co. v. United States*, 322 U. S. 102, this Court, referring to the Heard Act,* which was the predecessor of the Miller Act, said:

"We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced 'the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work'" * * * (p. 104).

"The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain *procedural* limitations on its beneficiaries" (p. 105).

"The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intention to protect those whose labor and materials go into public projects. *Fleisher Engineering Co. v. United States*, 311 U. S. 15, 17, 18; cf. *United States v. Irwin*, 316 U. S. 23, 29, 30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. Ostensibly the payment bond for protection of 'all persons supplying labor and material in the prosecution

* Act of August 13, 1894, c. 280, Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. Section 270.

of the work' and 'every person who has furnished labor or material in the prosecution of the work' is given the right to sue on such payment bond" (p. 107).

It has been held that the Miller Act cannot be invoked by one who has merely a cause of action for breach of contract, where the materials actually did not go into the work.

United States for use of Shlager v. MacNeil Bros. Co., 27 Fed. Supp. 180.

In *United States for use of Watsabaugh & Co. v. Seaboard Surety Co.*, 26 F. Supp. 681, aff'd 106 Fed. (2d) 355, the Court reviewing many decisions under the Heard Act, said (p. 692) :

"The thought underlying each of the decisions in which it is held that the thing for which claim was made falls within the meaning of the words 'labor and materials' as used in the Act involved in this case is that *the thing supplied was essential to carrying on and completing the work provided for in the contract and was wholly consumed in that work.*"

The Miller Act grants no cause of action to a supplier, whose material is rejected and condemned as defective.

II.

Neither Johnson nor the Government was a purchaser of the brick within the meaning of the A. S. T. M. specifications, so as to require either of them to sample and test the brick prior to installation.

The brick was required by the general contract to comply with A. S. T. M. specification C62-41T, Grade MW (R. 270). This specification was as follows:

"For purpose of tests bricks that are representative of the commercial product shall be selected by a competent person appointed by the purchaser, the place or

places of selection to be designated when the purchase order is placed."

Neither the Government nor Johnson gave any purchase order for the brick. The only purchase order given was by Friedman (R. 14). Neither the Government nor Johnson had knowledge when such purchase order was given, nor did they have control over the terms of the purchase order. That was a matter solely between Friedman, who gave the purchase order, and the Brick Company, which received the purchase order.

The Circuit Court of Appeals was not clear in its opinion as to whether it deemed either Johnson or the Government to be the purchaser of the brick, although the record is clear that only Friedman purchased the brick and gave the purchase order therefor (R. 14), at which time under the A. S. T. M. specifications, the person and place for the testing of the brick were required to be designated. The Circuit Court of Appeals said (R. 270) :

"Notwithstanding this provision, the purchaser, the Government, and the manufacturer, as well as Friedman, saw fit to proceed otherwise."

Later (R. 275) :

"We think it sufficient to quote the interpretation of the District Judge as to how the respective parties were obligated: 'The contractor was obligated to select his own samples when he ordered the brick from the subcontractor, and to test them, and if he failed to take advantage of this right given him (fol. 281) under the specifications, he assumed the risk of not being able, at a later date, to substantiate a claim that the brick was sub-grade when purchased; (2) the subcontractor had the right to assume that the contractor would either insist upon the method of sampling for tests given him by the specifications, or if he saw fit not to do so, would

run the risk incident thereto; and (3) the Government, as respects sampling, was placed under the same obligation in its relation with the contractor that the latter was in his relations with the subcontractor, *even though the Government may not have been a purchaser of the brick in the same sense*, and if the Government did not see fit to do its part under the specifications it assumed the resultant risk.' ”

A building contract is not a contract for the purchase or sale of materials.

In *Courtright v. Sweet*, 19 Barb. (N. Y.) 456, a subcontract for the furnishing of materials and completion of carpenter's work and turning, according to plans and specifications of main contract, was held not to be a contract of sale. The Court said (p. 458) :

“Nothing was sold or intended to be sold * * *. It was not a contract to *purchase* anything of the plaintiff. The contract * * * was but an agreement with a mechanic to bestow his work and labor upon materials to be furnished by him and thus to produce certain fixtures and additions upon the real estate of his employer.”

So, in *9 Corpus Juris*, page 699, Section 613, it is stated that a building contract is not within the statute of frauds as relating to a sale of merchandise.

The subcontract here involved contained the following provision :

“ARTICLE V. The party of the second part shall provide both in the shops and at the building, sufficient, safe and proper facilities at all times for the inspection of the work by the architect or the party of the first part and must upon the request of the party of the first part produce all vouchers showing the quality of the material used and must upon request take all steps necessary to procure the approval of materials and must

deliver samples thereof and *subject such materials to tests whenever required* * * * " (R. 213).

Pursuant to the foregoing provision, it was Friedman's duty to sample and test the brick not only as the purchaser thereof, under his purchase order (R. 14), but in accordance with his contract with Johnson.

Actually, the Brick Company certified not only to Friedman, but to Johnson (R. 18, 19, 114) that the brick conformed to A. S. T. M. specifications, and thereby waived the requirement that the brick should be tested at the place of manufacture, and such certification was issued and accepted by all parties, including the Government, in lieu of such test. The acceptance of the brick by the Government was given expressly upon the Brick Company's certificate (R. 158). The President of the Brick Company, who signed and swore to the certification testified as follows:

"(The Court) Now, my question is this. Now, as I understand it, by giving that letter you thought that was sufficient and that you did not need to make any more tests because you had this same lot, this same type of brick, tested from time to time in the past? Is that it?

(The Witness) That is correct, sir" (R. 112).

III.

In any event, the Government had the right to test materials during construction and reject them when defective.

The main contract contained the usual standard provisions with reference to inspection of materials as follows:

"ARTICLE 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection examination, and

test by Government inspectors *at any and all time during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the rejected material from the premises"* (R. 228).

* * * * *

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; *and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the Contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site"* (R. 229).

The Circuit Court of Appeals made no reference in its opinion to the right of the Government to inspect material during construction and to reject material even after acceptance where they departed from the specifications, except to state that having failed to test the material at the time of the purchase, the Government could not inspect or reject them at any time thereafter. The Circuit Court of Appeals quoted at length from the opinion of the District Court as

to the breach of performance on the part of the Government project engineer (R. 277). The District Court in its opinion (R. 172-173) quoted the above provision of the main contract in part, but omitted from its quotation the exception contained therein as to rejection of materials during the course of construction for departures from the specifications. The District Court referred to the finality of inspection and acceptance of materials "except as regards matters not here involved" (R. 173).

But the departures from the specifications for the brick were not only involved, they were the most important issue in the case. If there had been no departures from the specifications, the brick would never have been rejected by the Government.

The effect of the decision of the Circuit Court of Appeals is to deprive the Government of the right to reject defective material when discovered during the course of construction, even when, as here, it is undisputed that the brick tested by the Government did not conform to the specifications as to strength. In this manner, the Circuit Court of Appeals has disregarded the very provision upon which it held the Government guilty of a breach of contract in failing to inspect the material at the place of manufacture, by which provision it was expressly provided that such inspection should *not* be final in cases of departures from the specifications. The Government therefore had the right to inspect and reject the defective material at any time and at any place during the course of construction, as a protection *in addition to* the inspection at the place of manufacture.

The construction given to the contract provisions by the Circuit Court of Appeals is not only erroneous from a reading of the provisions themselves, but if such construction were sustained, it would have the startling result that the Government would be bound to accept material, as here undisputedly defective, as full compliance with the contract.

Indeed, according to the ruling of the Circuit Court of Appeals, once the materials had been inspected at the place of manufacture, any further inspection at the site of the job during construction, would be unlawful as a breach of contract.

The possibility of physical injury to persons using the housing, to say nothing of the expense to the Government if it were required to pay for the defective material and then to pay extra for its replacement by proper material, emphasizes the error in the ruling of the Circuit Court of Appeals since not only would the Government have no right to reject the defective material, but the Government would have no right to direct the contractor to remove and replace it. The ruling of the Circuit Court of Appeals therefore nullifies every provision in the contract whereby the Government could make sure, not only that the proper materials should be furnished, but that the contract should be properly performed before the contractor should become entitled to payment. The purpose of the contract was to construct a completed building at the site, in accordance with the safeguards against injury to person or property provided for in the strength of materials as specified. The purpose of the contract is not to accumulate piles of materials at the place of their manufacture. It is only when such materials as meet the standards of strength when set in place are furnished that the contractor has fulfilled his contract. When he furnishes materials which when put in place do not have the standard of strength for safety, he thereby "departs" from the contract and cannot be said to have performed it. The breach is then on the part of the person furnishing the defective material, not on the part of the Government.

IV.

The Courts below were without power to review the decision of the Government as to the acceptability of the material.

The Circuit Court of Appeals said (R. 272-273) :

"The District Court held in each controversy that there was no breach of warranty. We approve this holding, which is equivalent to a finding that the Baltimore Brick Company brick measured up to the specifications, that Friedman in this respect complied with his contract with Johnson, and that, therefore, the condemnation and rejection by the Project Engineer and the instruction of Johnson to Friedman based thereon was wrongful and in violation of Friedman's rights."

The Circuit Court of Appeals has therefore substituted its own determination for that of the Government as to the acceptability of the material.

The main contract provides:

"**ARTICLE 15. Disputes.**—Except as otherwise specifically provided in this Contract, all disputes concerning questions of fact arising under this Contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed" (R. 233).

"**ARTICLE 6. * * *** (d) Inspection of material and finished articles to be incorporated in the work at the site

shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the Contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site" (R. 229).

The standard specification in the main contract provides:

"The contracting officer shall decide all questions which may arise as to the performance, quantity, quality, acceptability, fitness of materials, and as to defects in the contractor's work."

The subcontract provides:

"Article I. The term 'Architect' shall include any person authorized by the general contract to direct or pass upon any matter or thing connected with the performance of the general contract" (R. 209).

"Article II. The subcontractor (second party) shall perform the work *to the satisfaction of the owner*, subject to all general and special clauses and conditions in the general contract. The subcontractor is required to do all things and be bound *by all rulings of the architect* to the same degree as the general contractor" (R. 210-211).

"Article V. The subcontractor shall within 24 hours after receiving notice, remove all materials *condemned by the architect*, or take down all portions of the work *which the architect shall condemn as in any way failing to conform to the specifications*" (R. 213-214).

"Article XIX. * * * Insofar as the work, labor and material involved in the subcontract are concerned, the subcontractor assumes all the obligations of the general contractor and agrees that *all rulings and requirements affecting the same shall be as binding upon the subcontractor as upon the general contractor*" (R. 223).

In view of the foregoing contract provisions, not only were the Courts below without power to review the decision of the Contracting Officer rejecting the material, but the evidence of tests not made by the Government was inadmissible and the testimony of the Brick Company's expert as to his opinion of whether the brick conformed to specifications was likewise inadmissible.

The decision of the Government representative was final and controlling and established the liability and obligation of Friedman to remove the defective brick and to replace the same with brick satisfactory to the Government at his own expense.

Neither the Circuit Court of Appeals nor the District Court made any finding of fraud or bad faith in the Government decision rejecting the brick. The evidence as to the Government test and the result thereof is set forth in detail in the testimony of the Government project engineer, who selected the bricks for testing (R. 22-40), and the Government engineer in the Bureau of Standards who made the test (R. 40-62).

The Circuit Court of Appeals in referring to the Government test of the brick said :

"It is not seriously controverted if this test be accepted as determinative of the controversy that there was a breach of the warranty and that this question should be decided in favor of Friedman but the circumstances indicate that this test should not be accepted as determinative" (R. 269).

The Circuit Court of Appeals adopted the findings of the District Court that the Government test was made from samples of brick which had lain on the construction site exposed to the weather, instead of brick chosen at the time the purchase was placed, and that this fact, *together with evidence of tests made by the Brick Company*, was sufficient to overcome the ruling of the Government that the brick was defective (R. 270-271). There was not a single word in the opinion of either the Circuit Court of Appeals or the District Court that the Government ruling was fraudulent or in bad faith.

In *Kihlberg v. United States*, 97 U. S. 398 where a Government contract provided that the distance for the transportation of stoves should be fixed by the Chief Quartermaster, this Court held that the action of the quartermaster cannot be subjected to the revisory power of the courts and that in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action is conclusive upon the contractor.

In *United States v. Gleason*, 175 U. S. 588, referring to the determination of the Court of Claims contrary to the decision of a Government engineer on his ruling as to extensions of time pursuant to the authority granted to the engineer by the contract to make such ruling, this Court said (p. 607):

"The fallacy, as we think, in the position of the court below, was in assuming that it was competent to go

back of the judgment of the engineer, and to revise his action by the views of the court. This, as we have seen, could only be done upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith."

In *United States v. Mason & Hanger Co.*, 260 U. S. 323, where the Government contract provided that the decision of the Contracting Officer should govern as to elements of costs, this Court held that the decision of the officer was conclusive.

In the absence of a finding that a Government engineer, who rejected building blocks as not conforming to specifications, acted in bad faith, or that he acted in fraud, or that there was gross mistake implying fraud, his decision is conclusive, since the Government contract does not contemplate that the opinion of the court should be substituted for that of the engineer.

Ripley v. United States, 223 U. S. 695, 704.

This Court has held that the only avenue for relief from the decision of a contracting officer on an inquiry of fact is by appeal to the head of the department as provided by the contract, and not by review in the Courts.

United States v. Callahan Walker Const. Co., 317 U. S. 56, 61.

The Circuit Court of Appeals in the case at bar expressly held, contrary to the above decision of this Court, that Friedman was not required to await the outcome of the appeal to the head of the department since Friedman would not be bound by the result thereof (R. 275).

In *Silberblatt & Lasker Inc. v. U. S.*, 101 Ct. Cls. 54, it was held that whether or not samples of material complied

with specifications was a question of fact, the decision of which was committed to the contracting officer, and that his decision is binding not only under a provision that all disputes concerning questions of fact shall be decided by him, but also under a specification that his decision "as to the proper interpretation of the drawings and specifications shall be final".

And such decision by the contracting officer as to the acceptability of materials, in the absence of evidence that it was arbitrary or not supported by substantial evidence, is not reviewable by the Court.

L. E. Myers Co. v. U. S., 101 Ct. Cls. 41.

In *Crystal Soap & Chemical Co. v. U. S.*, 3 C. C. F. 328, decided by the United States Court of Claims (#45544) on February 5, 1945, the question involved was whether certain materials which were rejected by the contracting officer complied with specifications. The contractor had tests made by private chemists who reported that the materials did comply. It was held that this was a question of fact, the settlement of which was committed by the contract to the contracting officer, and that his decision that the material was defective was binding.

In *Woarms v. Becker*, 84 App. Div. 491, 82 N. Y. Supp. 1086, where a subcontract provided that all work and materials were required to be approved by the architect designated in the general contract, it was held that the testimony of an alleged expert as to the work and materials was incompetent and that the admission of such testimony was reversible error.

And in *Daniels v. City of New York*, 196 App. Div. 856, 188 N. Y. Supp. 716, where an engineer was designated by the contract to determine the quality, acceptability and fitness of materials, it was held that notwithstanding the testimony of other experts contrary to the decision of the engineer,

as a matter of law, the determination of the engineer was binding on the contractor.

And any evidence in addition to the decision of the officer designated by the contract to make such decision is unnecessary.

Barash v. Board of Education, 226 App. Div. 249,
235 N. Y. Supp. 30.

A mere disagreement with the conclusion of an architect as to the sufficiency and quality of materials under the specifications presents no triable issue, since by the contract the determination of this very question is submitted to the architect, and his decision, in the absence of fraud or bad faith, is final.

Chas. S. Wood Co. v. Alvord & Swift, 232 App. Div.
603, 251 N. Y. Supp. 35, aff'd 258 N. Y. 611.

V.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *U. S. v. Madsen Construction Co.*, 139 Fed. (2d) 613 and in conflict with the weight of authority with respect to the binding effect of Government rulings upon subcontractors.

The subcontract here involved provides as follows:

"ARTICLE II. * * * It is the intention that in so far as the labor and material here involved is concerned the second party shall be required to do all things and be bound by all rulings of the architect to the same degree as the first party is bound * * *" (R. 211).

"ARTICLE XIX. * * * Insofar as the work, labor and material involved in this subcontract are concerned, the second party assumes all the obligations of the first party under the general contract and agrees that all rulings and requirements affecting the same shall be as binding upon the second party as upon the first party, * * *" (R. 222-223).

The Circuit Court of Appeals held:

"While, generally speaking Friedman might be held bound by the rulings and requirements of the Project Engineer, we hold, as was held in the Court below, that Friedman is not bound by the act of the Project Engineer in rejecting the brick now found to measure up to the contract requirements because neither the Project Engineer nor Johnson proceeded under the contract to exercise the right of conclusive decision provided by the contract" (R. 276).

In other words, the Circuit Court of Appeals held that the failure of the Government to select a competent person and designate a place of selection of the brick when the purchase order was given, as provided by the A. S. T. M. specifications, had the effect of depriving the Contracting Officer or his representative of exercising the right of conclusive decision, during the course of construction, that the brick was defective.

We have already shown that the decision of the Government representative was not subject to judicial review.

The decision of the Circuit Court of Appeals in failing to give effect to the above subcontract provisions was in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *U. S. et al v. Madsen Construction Co.*, 139 Fed. (2nd) 613 in a similar situation.

In *United States et al v. Madsen Construction Company, supra*, the provisions of the subcontract were substantially

the same as the subcontract in this case. In that case the subcontract stipulated that the subcontractor would assume the same responsibility and obligations to the general contractor as the general contractor had assumed to the United States Government; and that the performance by the subcontractor would be in accordance with drawings, plans and specifications prepared for the project by architects of the Government. The subcontractor acknowledged that these plans and specifications had been carefully inspected, and that it would abide by the contract between the general contractor and the Government. The principal contract in that case provided that all work and material furnished should be in strict accordance with specifications, schedules and drawings. It was further provided that all material and workmanship, if not otherwise designated by the specifications, should at all times be subject to inspection, examination and test by Government inspectors, and that the Government should have the right to reject defective materials and workmanship furnished by the Contractor and to require correction and satisfactory replacement with proper material without charge. The Circuit Court of Appeals held that in the absence of fraud or gross negligence, the Government Officer's decision in rejecting defective tile was binding, and that the subcontractor could not recover for additional compensation on account thereof since the contract provided that the decision of the officer as to the work should be final. The Court said (p. 616) :

"It should be noted that the Supreme Court has recognized that parties may enter into a construction contract by which the decision of an engineer or other officer concerning disputes arising during execution of the work shall be final and conclusive. And when they have done so, the decision of the engineer or other officer, in the absence of fraud or mistake, necessarily implying bad faith, will not be subject to the revisory power of the Court."

In *Linde Dredging Co. v. L. E. Meyer Co.*, 67 Fed. (2d) 969, the Project Engineer dealt directly with the subcontractor. During the course of the execution of the work, disputes arose between the engineer and the subcontractor. The rulings of the engineer were upheld. The Court said (p. 971):

"The cases controlling here are those which hold that, when a contractor agrees to do the work as provided for in the plans and specifications, and to be paid in accordance with them, and with the estimates of the engineers, these agreements, in the absence of the clearest kind of showing to the contrary, must be taken as evidencing the principal apparent purpose of the parties."

The effect of the judgments of the Circuit Court of Appeals is that Johnson, who is irrevocably bound by the Government decision and the finding of fact that the brick did not conform to the specifications, and who is therefore without further recourse or remedy against the Government, has been adjudged liable to Friedman, although the latter expressly agreed that he would be bound by such decision to the same extent as Johnson, and that all rulings of the Government should be as binding upon him as upon Johnson.

VI.

In any event, under the standard form of guaranty as to materials for a year after final acceptance, the subcontractor was bound to remove materials found defective.

The Government contract contained the standard form of guaranty as follows:

"Article 25. *General Guaranty.*

a. Neither the final certificate of payment nor any provision in the Contract Documents nor partial or

entire use or occupancy of the premises by the Government shall constitute an acceptance of work not done in accordance with the Contract Documents or relieve the Contractor of liability in respect to any express warranties or responsibility for faulty materials or workmanship. The Contractor shall remedy any defects in the work and pay for any damage to other work resulting therefrom which shall appear within a period of one year from the date of final acceptance of the work unless a longer period is specified. The Government will give notice of observed defects with reasonable promptness."

The subcontract provided as follows:

"Article XIX. * * * it being understood that the second party shall guarantee the labor and material installed by him (them), for such period and to the same extent as the first party is required by the general contract to guarantee the same * * *" (R. 221).

Whatever effect the provision with respect to inspection of brick at the place of manufacture may have, under the foregoing general guaranty provision the subcontractor guaranteed to remedy any defects in the brick which would appear during the period specified.

The subcontractor not only expressly assumed all the obligations of the general contractor insofar as the work and material involved in the subcontract was concerned, but the subcontractor expressly guaranteed his work and material.

The subcontractor was therefore bound to remedy the defects in his work as they appeared, i.e., he was bound to remove the brick which failed to measure up to the strength required and to replace the same with brick conforming to the specification in the standard of strength required.

In *Ehret Magnesia Mfg. Co., Inc. v. Gothicaite*, 149 Fed. (2d) 829, a subcontractor for the furnishing of pipe and for performance of part of the work called for in a general contract with the Government undertook to supply the pipe in accordance with the specifications of the general contract. One of the items in the specification required the contractor to guarantee the work for one year after completion.

It was held that the subcontractor assumed the obligation of the general contractor in relation to the particular part of the work performed by the subcontractor, and that the latter was liable for loss due to his failure to furnish and install pipe in accordance with the specifications and for expense in repairing the same.

In *U. S. ex rel Foster Wheeler Corp. v. American Surety Co.*, 142 Fed. (2d) 726, plaintiff sued the surety of a general contractor on a Miller Act bond for a balance due on boilers furnished to the general contractor. The latter intervened and asserted that it was not liable and pleaded a counterclaim based on the fact that in part defective brick were furnished by plaintiff and in part the failure of plaintiff to supply a sufficient design necessitated repairs made by the general contractor. The trial court found that some of the brick supplied by plaintiff did not comply with the specifications and that the repairs were due to such failure on the part of plaintiff.

It was held that plaintiff was required to prove that the material furnished by it conformed to the specifications, that it breached its contract in failing to supply materials in accordance with the specifications, and that plaintiff was liable on the specification contained in the general contract whereby the work was guaranteed for one year from the date of acceptance, which provision was held to be adopted by plaintiff, and that plaintiff was not only not entitled to recover against the surety or general contractor, but was also liable on the counterclaim for repairing the work in which plaintiff's defective materials were used.

VII.

The subcontractor was not entitled to recover for the additional cost of Grade H brick or for additional work performed in removing the defective Grade M brick, since the general contractor did not receive payment therefor from the Government.

The subcontract contains the following usual provision with reference to additional work:

"ARTICLE IV. * * * the first party in event of additional work, shall not be liable for a greater sum than it obtains from the owner for such additional work, less a reasonable overhead and profit to the first party, and the recovery for such extra work shall be conditioned upon a recovery therefor from the owner * * *"
(R. 213).

The Circuit Court of Appeals made no reference to the above provision in its opinion. Although the District Court referred to Article IV of the subcontract in which the provision is contained (R. 172), the District Court merely referred to the clause in the article providing for arbitration as to the value of additional work, without mentioning the condition precedent to recovery by the subcontract that the general contractor should receive payment for such additional work from the Government.

The District Court held that the arbitration clause was limited to disputes with respect to additional or extra work "in the strict sense, which is different from the dispute here involved" (R. 172).

Friedman's claim against Johnson is based on the additional cost of Grade H brick at prices of \$5, \$6 and \$7 per thousand over Grade M brick as specified in the con-

tract, together with overhead and profit thereon, totalling \$7,744.88, referred to by counsel for Friedman as "extra cost of material" (R. 196), and "extra cost of removing and rebuilding brickwork because of rejected brick", and labor and materials in replacing the rejected materials and in repairing walls, together with overhead and profit thereon, totalling \$810.52 (R. 197-198).

The gist of Friedman's claim is that he was required to furnish Grade H brick instead of Grade M brick because the Grade M brick furnished was rejected and no other Grade M brick was available, and that he was required to perform additional work in removing the rejected brick and replacing it with other brick. The claim is clearly within the provisions of Article IV of the subcontract. The District Court erred in ruling that the article did not apply to the dispute in this case, and the Circuit Court of Appeals erred in failing to give effect to the same.

Johnson was entitled to the benefit of the provision agreed to by Friedman that recovery from the owner was a condition precedent to recovery by him. Since Friedman failed to show the fulfillment of such condition precedent, he should not have been permitted to recover from Johnson.

In *Linde Dredging Co. v. L. E. Meyer Co.*, 67 Fed. (2d) 969, where it appeared that the subcontractor was to be paid as the general contractor was paid by the Government, and the general contractor received no payment from the Government for items of extra work claimed by the subcontractor, it was held that the subcontractor could not recover from the general contractor.

In *Cauldwell-Wingate Co. v. State*, 156 Misc. 901, 283 N. Y. Supp. 285 (New York Court of Claims) where the subcontractors were parties to an action brought by the general contractor against the State of New York, and it appeared that the general contractor had not been paid on the claims asserted by the subcontractors, and could not

recover on such claims against the State, it was held that the general contractor was not liable to the subcontractors and that the claims of the latter must be dismissed.

In *Hartwell v. Friedner*, 217 S. W. 231, a subcontractor sued a general contractor for damages in failing to furnish gravel for road work. The general contract provided that the County which made the general contract, would supply the gravel. The subcontract, by reference, made the general contract part of the subcontract. It was held (p. 234) :

"* * *, it appears conclusively that the plaintiffs as subcontractors, undertook this work subject to all the provisions contained in the contract between defendants and Wharton County, and subject to all the conditions and limitations contained in that contract. If therefore Wharton County, for any reason failed to perform its contract, this would not constitute any default on the part of defendants, and the plaintiffs would have no cause of action against the defendants for such default."

CONCLUSION.

Upon the grounds assigned, the petition for writs of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioners.

No. 1195

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

JOHN A. JOHNSON & SONS, INC., and AMERICAN
SURETY COMPANY OF NEW YORK,
Petitioners,

vs.

UNITED STATES OF AMERICA, to the use of
BALTIMORE BRICK COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

**MEMORANDUM OF BALTIMORE BRICK COMPANY,
IN OPPOSITION.**

JESSE SLINGLUFF, JR.,
Attorney for Respondent,
Baltimore Brick Company.



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IN THE
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vs.

UNITED STATES OF AMERICA, to the use of
BALTIMORE BRICK COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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FOR THE FOURTH CIRCUIT.

**MEMORANDUM OF BALTIMORE BRICK COMPANY,
IN OPPOSITION.**

NATURE OF THE CASE.

The Circuit Court of Appeals for the Fourth Circuit affirmed a judgment in favor of the United States of America to the use of Baltimore Brick Company entered

by the District Court for the District of Maryland against John A. Johnson & Sons, Inc., American Surety Company of New York, and Jacob Friedman. The Circuit Court of Appeals likewise affirmed a separate judgment in a different amount entered by the District Court against John A. Johnson & Sons, Inc., and American Surety Company of New York in favor of Jacob Friedman. The two cases were heard together in the Circuit Court of Appeals and disposed of in the same opinion because they arose out of the same transaction and were tried together in the District Court.

John A. Johnson & Sons, Inc., and American Surety Company of New York now seek two separate writs of certiorari for the purpose of reversing each of the judgments entered below. This memorandum is filed on behalf of the Baltimore Brick Company, which is the respondent in No. 1195. This respondent is not concerned with the disposition of the petition filed in No. 1196.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals filed on February 6, 1946, is printed in the transcript of the Record at pages 226 to 280, inclusive (see also 153 Fed. (2d) 534). The District Court filed two opinions. The first opinion was filed March 27, 1945, and is printed in the Record at pages 2 to 8. The second opinion, which deals entirely with the controversy between petitioners and Jacob Friedman, is printed in the Record at pages 167 to 183.

STATEMENT.

John A. Johnson & Sons, Inc., herein referred to as "Johnson", signed a contract with the United States of America, through the Federal Public Housing Authority, to con-

struct a certain housing project at Jarboesville, Maryland. The American Surety Company of New York was surety on the Johnson contract, in accordance with the terms of the Miller Act. (Act of August 24, 1935, C. 642, Secs. 1 & 2, 49 Stat. 793, 40 U. S. C. 270 (A) and 270 (B)). Johnson, as general contractor, signed a contract with J. Friedman Company, herein referred to as "Friedman", for the masonry work on the project. Friedman bought the brick for the masonry work from the Baltimore Brick Company, herein referred to as the "Brick Company".

The Brick Company brought suit under the Miller Act in the United States District Court for the District of Maryland against Friedman, Johnson and the surety for the balance due for brick ordered by Friedman and used by him in the construction of the buildings. The brick was delivered to the project in accordance with the schedule set forth in the printed Record at pages 10, 11 and 12, but Friedman failed to pay the entire contract price for this brick. He contended that a part of the brick had failed to meet specifications and could not be used for outside work as contemplated by the contract, and that it was necessary to remove some of the brick which had been so used and to buy a more expensive brick for that purpose. He claimed the right to deduct from the amount of the contract price the extra cost of the more expensive brick as well as the cost of removing the unsatisfactory brick. Subject to this offset, he admitted his liability to pay the contract price for all of the brick which had been delivered, since all of it was actually used in the project, although not in outside work.

STATUTE.

The Miller Act. Section 270a provides:

"(a) Before any contract, exceeding \$2,000 in amount, for the construction * * * of any public build-

ing or work of the U. S. is awarded to any person, such person shall furnish to the U. S. the following bonds * * *

"(2) A payment bond * * * for the protection of all persons supplying labor and material in the prosecution of such work provided for in said contract for the use of each such person."

(Section 270b):

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished * * * shall have the right to sue on such payment bond for the amount, or the balance thereof unpaid at the time of institution of such suit * * *."

ARGUMENT.

The petition in this case (as distinct from the petition in No. 1196) is based entirely on the contention that the Circuit Court of Appeals erroneously construed the provisions of the Miller Act so as to make them applicable to a material man whose material was rejected and not used in the prosecuting of Government work.

The contention is based on an evident misreading of the record. The Circuit Court of Appeals did not so construe the Miller Act. It merely held that a material man whose goods were employed in a project which had been bonded in accordance with the Miller Act could recover judgment against the principal contractor and the surety for the full amount of the contract price of the goods so used, in the absence of any breach of warranty. It likewise held that the burden of proving the breach of warranty was on the purchaser and that it had not been met in this case. In so holding the Circuit Court of Appeals followed the plain language of the Miller Act and the clearly established doctrines of the law of sales. *Nicholson v. American Hide &*

Leather Co., 307 Mass. 456, 30 N. E. (2) 376; *Wood Motor Car Co. v. Tobin*, 120 N. J. L. 587, 1A (2) 199; see *Gay Sullivan & Co. v. Glaser*, *Crandell Co.*, 102 F (2) 149; *Eckels v. Cornell Co.*, 119 Md. 107; 48 Am. Jur. Sec. 309; 55 C. J. 837.

Unless this Court desires to review the findings of fact of the District Court, which were unanimously concurred in by the Circuit Court of Appeals, no purpose would be served by granting the writ in this case.

CONCLUSION.

Since the petition in No. 1195 was based on a misunderstanding of the record, it should be denied.

Respectfully submitted,

JESSE SLINGLUFF, JR.,

Attorney for Respondent,
Baltimore Brick Company.



MAY 26 1940

CHARLES ELMORE DROPLEY
CLERK

IN THE
Supreme Court of the United States

No. 1196.

JOHN A. JOHNSON & SONS, INC., and AMERICAN
SURETY COMPANY OF NEW YORK,
Petitioners,

vs.

JACOB FRIEDMAN, Trading as J. FRIEDMAN
COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT.

**BRIEF FOR JACOB FRIEDMAN
IN OPPOSITION.**

HOWARD HENIG,
Counsel for Respondent.



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BRIEF FOR JACOB FRIEDMAN IN OPPOSITION.

Opinions Below.

The opinions of the District Court (R. 167), and of the Circuit Court of Appeals (R. 266), are not as yet officially reported.

Jurisdiction.

The judgments of the District Court in Nos. 1195 and 1196 were entered April 19, 1945 (R. 166). On February 6, 1946 orders were made by the Circuit Court of Appeals for the Fourth Circuit unanimously affirming the judgments of the District Court. The jurisdiction of this Court is invoked under the Act of February 13, 1925.

Statement.

This action, under the Miller Act*, was brought by the Baltimore Brick Company, as a use plaintiff, against John A. Johnson & Sons, Inc., general contractor on a Federal Public Housing Authority project, and American Surety Company of New York, its surety, as defendants. Jacob Friedman, masonry sub-contractor on the project and the respondent here, although not sued, intervened in the litigation in order that the issues raised by the Brick Company be completely adjudicated. By appropriate pleadings, Friedman alleged that he had been advised by Johnson that the brick supplied by the Brick Company did not comply with the specifications and did not meet the sworn warranty of quality made by the Brick Company to Johnson and Friedman; that if it be found that the brick did not comply with the sworn warranty, then the Brick Company was liable to Friedman; that if it be found that the brick did comply, then Johnson and Surety were liable to Friedman; that in any event, Friedman was an innocent party. Friedman's counterclaims as intervenor, therefore, were in the alternative. Judgment was entered in the District Court against Friedman, Johnson and Surety, and a separate judgment was rendered in favor of Friedman against Johnson and Surety, based upon the finding that the brick did comply with the specifications, and that their rejection was wrongful. Friedman joined with Johnson and Surety as appellant in the appeal to the Circuit Court of Appeals and was appellee in Johnson's appeal from the judgment in Friedman's favor.

Friedman has not joined with Johnson and Surety on this petition for a writ of certiorari, so that he appears only in No. 1196, as respondent.

The masonry sub-contract, by reference to the general contract, required *inter alia* that "brick shall be new, com-

*Act of Aug. 24th, 1935, c. 642, 49 stat. 793.

mon brick made from clay or shale and comply with A. S. T. M. specification C62-41T grade MW" (R. 208).

A. S. T. M. specification C62-41T printed at length in the record (R. 48), provided for grades, standards and method of sampling and testing brick, adopted by the American Society for Testing Materials (R. 48).

Friedman, before starting construction, submitted samples of the brick to be supplied by the Brick Company to Johnson, and Johnson submitted the samples to the project engineer, Powell, (R. 184). Powell, in a letter to Johnson dated December 8, 1943, stated (R. 184):

"In accordance with your letter of December 2, 1943, concerning the sample of concrete units and brick submitted to this office, the same are hereby approved to be according to specification. Kindly furnish manufacturer's certificate of compliance with federal specification as soon as possible."

Powell, later in his testimony, referred to the letter as a "typographical error" (R. 264), but as pointed out by the Circuit Court of Appeals (R. 274), he acknowledged his previous approval on January 22, 1944 (R. 30).

On January 10, 1944 the Brick Company sent the requested warranty (R. 18, 19).

On or about January 15, 1944, Powell became concerned over reports of failure of MW brick on another project in the same area (R. 24). He selected 12 bricks at random from one of 8 or 10 piles on the site (R. 25, 263), which were sent to the Bureau of Standards for testing and analysis. The selection was made "from a pile that had been lying out in freezing winter weather for a considerable period of time, with many surfaces exposed that would not have been so exposed after being put in place in the buildings" (R. 270). All of the samples met the requirements of the A. S. T. M. test, except 3,

which fell somewhat short of the minimum compressive strength requirement of 2,200 lbs. per square inch (R. 91).

On January 22, 1944 the F. P. H. A. notified Johnson that the brick supplied by the Brick Company were condemned (R. 30). Johnson advised Friedman of this action (185, 186), and Friedman passed this information on to the Brick Company (R. 66, 129). The latter disclaimed responsibility (R. 78).

The method of sampling and testing set forth in A. S. T. M. specification C62-41T was as follows (R. 52):

“Sampling and Testing:

5. (a) For purpose of tests, brick that are representative of the commercial product shall be selected by a competent person appointed by the purchaser, the place or places of selection to be designated when the purchase order is placed. The manufacturer or the seller shall furnish specimens for tests without charge.”

The Circuit Court of Appeals referring to that specification, and to the test which had been conducted, said (R. 270):

“ * * * Notwithstanding this provision, the purchaser, the government, and the manufacturer, as well as Friedman, saw fit to proceed otherwise and the only test made for the purpose of determining the quality of the brick and whether they complied with the A. S. T. M. requirements was made not with brick selected by a competent person appointed by the purchaser, nor with brick selected at the place or places designated when the purchase order was placed, as provided in the above quoted provision, but with brick selected by the Project Engineer, the representative of the government, which brick

were selected by him from places chosen by him not when the purchase order was placed, but on January 15, as the Project Engineer testified, which was more than a month after the purchase order was placed and after the selected brick had lain exposed to winter weather with alternate freezing and thawing for at least twenty days and probably longer."

Powell condemned not only the bricks on the exposed pile, but all the brick which the FPHA had previously approved, in other words, all MW brick supplied by the Brick Company. The condemnation, however, was limited to the use of bricks on exposed faces, and the bricks supplied were authorized for use and continued to be used for backing up and for interior faces of walls (R. 187, 188).

Both the District Court and the Circuit Court of Appeals found that the brick did comply with the specifications, that Friedman in respect of the brick did comply with his contract with Johnson, and that "the condemnation and rejection of the brick by the Project Engineer was wrongful and in violation of Friedman's rights" (R. 273).

Questions Presented.

The fundamental question raised by the petitioner is whether, in a contract for construction of a public work, a subcontractor is conclusively bound by a decision of the project engineer, where the decision was made in violation of an express contract provision.

Also raised collaterally is the question whether the government's right to condemn allegedly defective materials may be enlarged to permit rejection of all materials of the same kind when the rejection was on the basis of inferior samples selected in violation of an express contract provision designating a method of selection.

Argument.

The petitioner urges two contentions not presented or assigned as error below, and which it, therefore raises for the first time in this Court. These matters need not be considered here.

Owens v. Union Pacific Railway Co., 319 U. S. 715, 724;

Sonzinsky v. U. S., 300 U. S. 506;

Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 418.

The first such contention erroneously assumes that the Brick Company was permitted to recover for brick condemned and rejected by the government and not used in construction. The record shows that the Brick Company delivered brick to the site of the value of \$16,402.40, and received payment of \$10,747.20 (R. 12). The value of bricks actually removed from the wall upon the direction of the project engineer was only \$95.85 (R. 197). The bricks remaining on the site were authorized for use by the F. P. H. A. for backing up and for interior masonry and *were actually used for that purpose* (R. 187-189). The action, therefore, was clearly one for goods sold and delivered and came within the provisions of the Miller Act.

The second contention is that the government's own specification in its contract with Johnson was not fully binding upon it, and not, therefore, binding upon Johnson. In short, the petitioner argues that the portion of the specifications relating to method of sampling and testing refer to selection of samples by purchaser's representative, and that since the government is not a "purchaser" it is not bound. This tenuous position requires a forced reading of the contract, to permit escape from the provision of the contract inserted by the government

itself. As the Circuit Court of Appeals said, the government, as owner, and Johnson, as general contractor, were fully bound by the specifications and were required to do their part under the specification or run the resultant risk (R. 275).

Here the mode and method of conducting the test were specified. The use of some other method can not be relied upon to establish a breach of contract.

Continental and Commercial Trust v. Corey Bros.,
208 Fed. 976;

Economy Trust v. Raymond Concrete Pile Co.,
111 Fed (2nd) 875;

The Isaac Newton, Fed. Cas. No. 7089 Abb. Adm.
11.

Friedman, as subcontractor, was entitled to rely upon the plans and specifications, *Christie v. U. S.*, 237 U. S. 234 (1914), and not to assume the risk of a test on samples taken without notice, under conditions which "may have altered very materially the condition of brick * * *" (R. 28, 272).

The remaining contentions in petitioner's brief, all of which have been rejected by both Courts below, relate to various provisions of the prolix contract documents, and fall into two categories;

FIRST: The provisions in the masonry subcontract governing and limiting Friedman's right to recover for "extra work" (R. 213). This controversy did not involve extra work or work outside the contract, but rather improper rejection of materials supplied. Friedman's workmanship was not questioned. The learned District Judge held (R. 173):

" * * * It may be said here * * * that we do not consider they (the above provisions) have any application to the present controversy because they

clearly appear to relate to extra work, that is, work not within the express or reasonably implied scope of the specifications, agreed upon at the time that the two contracts were made."

This holding was expressly affirmed by the Circuit Court of Appeals (R. 279).

SECOND: The provisions of the general contract and the masonry subcontract, which petitioner argues bind Friedman to abide by all rulings of the owner, the F. P. H. A., just as Johnson is bound, the F.P.H.A. having power to make "conclusive decisions" on all disputed questions of fact (R. 225-235, 208-224).

These arguments proceed on the assumption that the bricks delivered were defective and disregard the successive findings of fact of the Court below. The Circuit Court of Appeals said (R. 272, 273):

" * * * The District Court held in each controversy that there was no breach of warranty. We approve this holding, which is equivalent to a finding that the Baltimore Brick Company brick measured up to the specifications, that Friedman in this respect complied with his contract with Johnson, and that, therefore, the condemnation and rejection by the Project Engineer and the instruction of Johnson to Friedman based thereon was wrongful and in violation of Friedman's rights."

These findings were fully supported by the evidence. No substantial reason has been advanced for disturbing them.

In *Virginian Railway v. Federal*, 300 U. S. 515, 542, this Court said:

"The concurrent findings of fact of the two Courts below are not shown to be clearly erroneous or unsupported by the evidence. We, accordingly, accept them as the conclusive basis for decision."

See also

Mahneck v. Southern S. S. Co., 321 U. S. 96, 98;
Goodyear v. Ray-O-Vac, 321 U. S. 275, 278;
Anderson v. Abbott, 321 U. S. 329, 356.

The finality of the government's decision depends upon the government's performance and cannot be based upon a breach of the contract. The decision of the contracting officer, or as here, the project engineer, is not conclusive if based upon a change or misinterpretation of the contract.

Dock Contractor Co. v. City of New York, 296 Fed. 377 (CCA 2) 1921;
Helvetia Milk Condensing Co. v. United States, 56 Fed. (2nd) 676, 74 C. Cl. 740;
Tomlinson v. Ashland County, 170 Wisc. 58.

This is not to say that the contracting officer cannot reject material if it is in fact defective. The decision is only that the right of absolute rejection—rejection regardless of fact—does not exist when the contract which gives that power has not been performed in that respect. The project engineer, in the exercise of honest judgment, could have rejected the brick in the exposed pile or could have rejected masonry in place, but he could not on the basis of a test conducted in violation of contract condemn all previously approved materials.

Nothing in *United States v. Madsen Construction Co.*, 139 Fed. (2nd) 613, conflicts with this decision. The question here presented is "quite distinct from mere questions of fact relating to the prosecution of the work, regarding which discretion is vested in the plant engineer" (R. 181).

It should be observed that the District Judge below, sitting as a jury, also found as a fact that the government's specifications were in error in requiring grade

MW brick, an inferior grade of brick, in the exterior work, "and upon recognizing its error, which it did not do until the masonry work was well advanced, it then attempted to cover up its error by relying upon its right to reject any and all materials under the contract" (R. 183). This conclusion finds full support in the record. The A.S.T.M. specification itself indicated the undesirability of the brick for exposed masonry surfaces (R. 57), and, to repeat, the project engineer, after the Bureau of Standards' test, sanctioned and approved the use of the "condemned" brick for backing up and for interior masonry, where it was not exposed to the weather (R. 187, 188).

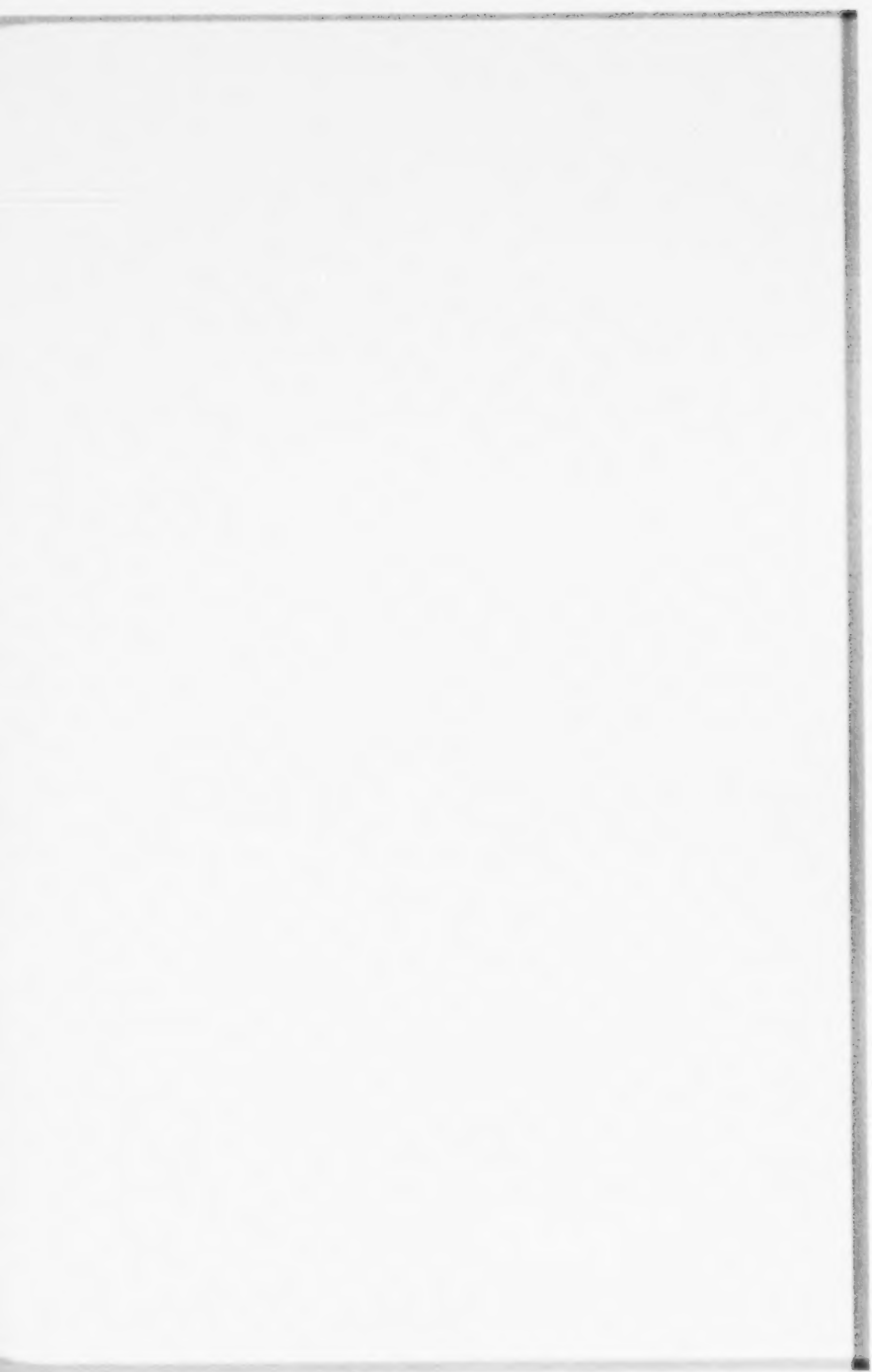
Friedman is an innocent party in this controversy. He ordered the brick from the only local plant supplying the grade specified. His workmanship was not questioned. Upon the institution of suit, he intervened promptly to the end that his rights could be determined as against the Brick Company, and Johnson, the general contractor. He has no direct remedy against the government arising out of violation of the specifications, but is limited in remedy to Johnson. Johnson is the only party who can pursue a remedy against the government arising out of the breach here found.

CONCLUSION.

The decision below is correct, and there exists no conflict. It is respectfully submitted that the petition for a writ of certiorari be denied.

HOWARD HENIG,
Counsel for Respondent.

May, 1946.



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JUN 7 1946

CHARLES ELMORE BROFFLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1195

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY
COMPANY OF NEW YORK,

Petitioners,

—vs.—

THE UNITED STATES OF AMERICA to the use of
BALTIMORE BRICK COMPANY.

No. 1196

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY
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—vs.—

JACOB FRIEDMAN, trading as J. FRIEDMAN COMPANY.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRITS OF CERTIORARI

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Counsel for Petitioners.



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The Facts as to the Rejection of the Brick by the Government.

Respondent Brick Company states in its brief that petitioners' contention that the Circuit Court of Appeals

erroneously construed the provisions of the Miller Act so as to make them applicable to a material man where material was rejected and not used in the prosecution of Government work is based on a misreading of the record (page 2). It is also stated that all of the brick was actually used in the project, although not in outside work (page 3). Said respondent does not dispute that the brick was furnished for exterior use and that the Government rejected it for such use, and that such rejection gave rise to the counterclaim against the Brick Company for the failure to deliver brick according to the A. S. T. M. specifications.

The facts as to the rejection by the Government are disclosed by the record. On January 12, 1944, the Government advised petitioner Johnson that samples of the brick were approved to be according to plans and specifications under date of December 8th, that a number of these bricks in stock piles had badly deteriorated and fallen apart due to frost and that Johnson was proceeding with the brick work at its own risk (R. 236). On the same day, Johnson communicated this information to respondent Friedman (R. 237).

On January 22, 1944, the Government project engineer wrote Johnson as follows:

"Subject: Defective brick now being used on project.

"Re: Projects Md-18261-2-3-4.

"Gentlemen:

"In connection with the above reference subject, this is to advise you that the brick which were approved by this office, subject to plans and specifications requirements do not comply with the test of the A. S. T. M. Specifications, C-62-41T, Grade MW.

"A recent report of the Bureau of Standards indicates that 25% of these bricks did not meet the crushing strength test.

"The same is hereby condemned."

On January 24, 1944, Johnson wrote Friedman as follows:

"We enclose herewith a copy of a letter from the project engineer on the above projects condemning the brick you have been using.

"You will note that in our letter of the 12th we cautioned you to look into this situation.

"It is your responsibility to bear all of the expense of any work that might be required to be replaced.

"You are to take immediate steps to procure brick for these projects that meet all specification requirements."

Friedman forwarded copies of the above letters to the Brick Company and advised the Brick Company that its brick had been rejected and that he would hold the Brick Company for any damage (R. 64-67).

Thereafter and on January 28, 1944, the Government project engineer wrote Johnson as follows:

"Subject: Use of M-type brick.

"Attention Mr. Shaw.

"Gentlemen:

"Confirming our verbal understanding on the above subject, please be advised as follows:

"This brick can be used for backing up or interior masonry where it is not exposed to the weather or below grade on foundation. Where such a condition exists, the new approved brick should be used on this work."

On February 8, 1944 the Government wrote a "clarification" letter in which it stated that the brick could be used for backing up or interior masonry where it was not exposed to the weather (R. 188).

On September 14, 1944, respondent Friedman wrote Johnson, enclosing a copy of letter from the Brick Company dated August 1, 1944, stating that the Brick Company did not intend to abide by the results of the Government's decision and "*will attempt to enforce collection from us for the rejected brick*" (R. 193-194).

Not all of the brick was used on the interior work as claimed by respondent Brick Company in its brief. In fact, part of Friedman's counterclaim was for the cost of removing and rebuilding brick work because of rejected brick (R. 196). Respondent Friedman admits in his brief (page 6) that some of the brick was actually removed (R. 197). There was no allowance in the judgment awarded to the Brick Company for the brick removed and not used on the project.

The point made by petitioner that the judgment allowed a recovery under the Miller Act for material not used in the project is therefore not met by a showing that *most* of the brick was used on the interior, especially since the brick was actually furnished for use on the exterior and was rejected by the Government for such use.

In Any Event, Respondent Friedman Was Bound by the Government Rejection of the Brick for Exterior Use, So That No Recovery Should Have Been Allowed for Furnishing Grade H Brick Substituted for the Rejected Grade M Brick.

In order to avoid the effect of his agreement in the subcontract to be bound by all rulings of the Government to the same degree as Johnson and to assume all the obligations of Johnson insofar as Friedman's work was concerned, Friedman relies in his brief (page 8) upon the findings of fact *by the Courts* that the bricks were not defective.

It is shown in the brief of petitioner (pages 20-26) that the Courts below were without authority to review the deci-

sion of the Government that the brick was defective, since by the standard specifications in the Government contract all questions as to the acceptability and fitness of materials were to be decided by the contracting officer, and by the standard provisions of the Government contract, all of which were assumed by Friedman, the decision of the contracting officer on all disputes concerning questions of fact were final, subject only to appeal to the head of the department.

The cases cited in respondent Friedman's brief to the effect that this Court will not disturb concurrent findings of fact by the Circuit Court of Appeals and the District Court do not apply to the situation at bar, since in none of those cases was the question involved as to the authority of the Courts to review the decision of a Government representative.

Virginia Railway v. Federation, 300 U. S. 515, was a labor union case involving the application of the Railway Labor Act with respect to findings of fact by the Courts as to labor disputes.

Mahnich v. Southern Steamship Co., 321 U. S. 96, was a personal injury case in admiralty involving findings by the Courts as to the seaworthiness of a vessel.

Goodyear Co. v. Ray-O-Vac Co., 321 U. S. 275, was a patent infringement suit involving findings by the Courts as to the infringement.

Anderson v. Abbott, 321 U. S. 349, was an action for an assessment against stockholders of a bank, involving findings by the Courts as to the bona fides of the organization of a holding company.

Respondent Friedman further attempts in his brief (page 9) to avoid the effect of the Government decision on the ground that such decision is not conclusive if based upon a change or misinterpretation of the contract. Not only is this an incorrect statement of the rule of law involved,

since such decision may be attacked only by a showing of fraud, or of mistake or negligence so great as to justify an inference of bad faith, but there is no evidence in the record of a change or misinterpretation of the contract. The A. S. T. M. specification called for brick having a minimum compressive strength of 2200 pounds per square inch (R. 49). The brick furnished by the Brick Company was below the allowable minimum (R. 58, 237). There was therefore neither a change nor a misinterpretation of the contract involved. The cases cited by respondent Friedman on this point do not support the contention that the decision of the Government representative under the contract provisions here involved may be set aside if based on a change or misinterpretation of the contract.

In *Dock Contractor Co. v. City of New York*, 296 Fed. 377, the contract provided that the engineer was *not* permitted to interpret or construe the contract, and the contract did *not* give the engineer power to determine the necessity for underpinning buildings. The Court therefore properly held that the engineer's decision as to the necessity for underpinning was not final. In our case the contractor clearly provided that the Government representative should determine the fitness and acceptability of materials and that the parties would be bound by such determination.

In *Helvetia Milk Condensing Co. v. United States*, 56 Fed. (2d) 676, the contract did *not* provide that the calculation of profit made by the Federal Trade Commission would be final and conclusive and the Court therefore properly held that plaintiff was not bound by such determination. Moreover, the Court in that case held, as contended by petitioner here, that where the decision of an officer is made final by the contract, it may be impeached only for fraud or mistakes so gross as necessarily to imply bad faith or failure to exercise an honest judgment.

In *Tomlinson v. Ashland County*, 170 Misc. 58, where an architect was *not* given the right to construe the contractual

rights or liabilities of the parties, and he was merely given the power to decide the meaning of the plans and specifications, the Court properly held that the interpretation by the architect as to the right of plaintiff to charge for certain items of extra work was beyond the architect's jurisdiction. There is no dispute in our case as to the jurisdiction of the Government representative to decide questions as to the fitness and acceptability of material.

Respondent Friedman also argues (page 9) that the finality of the Government's decision depends upon the Government's performance and cannot be based upon a breach of contract. It is not clear just what is meant by this statement. Presumably, the reference is to the rejection of the brick "on the basis of a test conducted in violation of contract" as stated in respondent Friedman's brief (page 9). This relates to the A. S. T. M. specification requiring the selection of brick for testing by a person appointed by the purchaser at a place to be designated when the purchase order is placed (R. 52).

It has been shown in petitioner's brief that Friedman alone was the purchaser and gave the purchase order (R. 14). Hence, Friedman alone was guilty of any breach of contract arising from the failure to designate the place of selection of brick for testing when the purchase order was placed.

Respondent Friedman states in his brief (page 7) that the mode and method of conducting the test of the brick were specified and that the use of some other method cannot be relied upon to establish a breach of contract. Since Friedman alone was responsible for the test to be made from brick selected by a person and at a place designated in the purchase order for the brick which only Friedman gave, and of which neither Johnson nor the Government had any knowledge, Friedman cannot now complain that when the brick was tested by the Government during construc-

tion, in accordance with its right to make such test, the brick was found to be defective.

The cases cited by the respondent on this contention have no application whatever to the situation here, and, indeed, do not even bear on the point made by respondent.

Continental etc. Bank v. Carey Bros. Cont. Co., 208 Fed. 976, involved the construction of a dam. The Court found that the engineer approved a deviation from the prescribed method of construction and that the contractor was not responsible for a subjacent condition. There was no question involved in that case of a form of test different from the form provided by the contract.

In *Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co.*, 111 Fed (2d) 875, it was held that the specification of length and maximum resistance of piles for foundations did not relieve the contractor of the obligation to perform his work in a workmanlike manner so as to accomplish the result for which the work was intended. Again, there was nothing in that case even bearing on respondent's contention.

The Isaac Newton, Federal Cases No. 7089, was an admiralty case in which it was held that an action brought by the builders of a steam engine for a boat was not premature by reason of the fact that the builders were required to test and prove their work, which test was prevented because the owners of the boat took possession thereof and commenced the running before the test was made. There was no question in that case of a difference in form of test as against the form provided by contract.

Respondent Friedman contends that he was entitled to rely on the plans and specifications and not to assume the risk of a test on samples taken without notice under conditions which "may have altered very materially the condition of brick" (page 7). It has already been shown that Friedman alone was in a position to have the brick tested by a person and at a place designated in the purchase order. He

failed to have the brick so tested although he undertook by his contract with Johnson (Article V, R. 211) to subject materials to tests *whenever required*, and he therefore deliberately assumed the risk of a test made by the Government during the construction in accordance with its absolute right to do so. Moreover, Friedman himself was responsible for any alteration in the condition of the brick which may have taken place, since under the provision of Article V of his contract with Johnson (R. 214), he agreed to cover, protect and exercise due diligence to secure his work from injury.

In this connection, respondent Friedman cites the case of *Christie v. United States*, 237 U. S. 234 (page 7), which has no application whatever to this case. In that case where there was a deceptive representation in specifications as to material to be excavated, it was held that where time did not permit borings to be made by the contractor to verify the representation, the contractor was permitted to recover extra costs resulting from such misrepresentation. There is no question in this case as to any misrepresentation in the specifications.

Respondent Friedman makes no attempt in his brief to answer petitioner's contentions, that in any event, the Government had the right to test materials and reject defective materials at any time during construction, and require its correction, and that inspection and acceptance of materials at the place of manufacture was not final in the case of departures from the specifications, and that in any event, Friedman was bound under the standard form of guaranty for a year after final acceptance to remove defective materials.

Respondent Friedman attempts to avoid the usual provision in the subcontract that Johnson should not be liable for a greater sum for additional work than Johnson obtained from the Government and that recovery by Friedman for

extra work was conditioned upon a recovery by Johnson from the Government, on the ground that "extra work or work outside the contract" was not involved (Respondent Friedman's brief, page 7).

The record discloses that Friedman's claim is not only for the additional cost of Grade H brick, not provided by the contract, above the cost of Grade M brick called for by the contract, but that such cost was characterized on the trial by counsel for Friedman as "extra cost of material" and the work of removing and replacing rejected brick work was likewise referred to by Friedman's counsel as "extra cost of removing and rebuilding brickwork because of rejected brick" (R. 196, 197-198). It is clear that extra work and work outside the contract was involved and that the recovery allowed to Friedman was contrary to the sub-contract provisions whereby Friedman agreed that such recovery should not be had unless Johnson first recovered from the Government.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioners.

